

Letter of Findings: 04-20110363
Sales and Use Tax
For the Tax Years 2005-2009

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ISSUES

I. Sales and Use Tax—"Disposable Medical Supplies."

Authority: IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-18; IC § 6-8.1-5-1; [45 IAC 2.2-5-28](#); [45 IAC 2.2-5-36](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012).

Taxpayer protests the imposition of use tax on its purchase of "disposable medical supplies."

II. Sales and Use Tax—"Purchases Paid by Government."

Authority: IC § 6-2.5-5-8; IC § 6-2.5-5-16; IC § 6-2.5-5-24; IC § 6-2.5-6-14.1; IC § 6-8.1-9-1.

Taxpayer protests the imposition of use tax on its purchase of "medical supplies and equipment" that are "sold to the government."

III. Tax Administration—Interest.

Authority: IC § 6-8.1-9-2; IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest from the due date of the returns.

STATEMENT OF FACTS

Taxpayer operates an Indiana health care facility. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed use tax for the tax years 2005, 2006, 2007, 2008, and 2009. The audit also addressed two refund claims Taxpayer had filed for the 2007, 2008, and 2009 tax years, which the Department granted in part and denied in part. The Department made the assessment of additional use tax based upon Taxpayer's purchase of a variety of supplies without paying Indiana sales tax at the time of purchase or remitting use tax to the Department. Taxpayer protested the assessment. In its protest, Taxpayer presented additional documentation that was not available at the time of audit. Prior to the hearing, this information was reviewed by the audit division. After reviewing the additional documentation, the audit division agreed to make adjustments relating to two issues (the "bank transaction" issue and the "laundry transactions" issue). Nonetheless, Taxpayer continued its protest on the remaining assessments. An administrative hearing was held, and this Letter of Findings results. Additional facts will be provided as necessary.

I. Sales and Use Tax—"Disposable Medical Supplies."

DISCUSSION

The Department initially notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

The Department found that Taxpayer had purchased certain "medical supplies" without paying sales tax at the time of purchases, and assessed used tax on the purchases.

IC § 6-2.5-3-2(a) provides, "An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

Initially, the Department referred to [45 IAC 2.2-5-36\(a\)](#), which states that "the gross retail tax shall apply to the... purchase transactions made by licensed practitioners [to acquire]... surgical instruments, equipment and supplies." The Department determined that Taxpayer either was a "practitioner" or was making sales to a "practitioner" that was purchasing "surgical supplies," and applied [45 IAC 2.2-5-36\(a\)\(3\)](#), which signifies that the purchases of "surgical supplies" are subject to sales and use tax.

Taxpayer asserts that its purchase of "'disposable medical supplies' [such as] catheters, guides, introducers, various kits, various packs, disposable staplers, sheaths, trach tubes, foley trays, etc" are exempt from sales and use tax under the "durable medical equipment exemption" provided under IC § 6-2.5-5-18. Taxpayer maintains that "all disposable medical supplies are purchased directly by [Taxpayer] and then resold to the patient on a licensed practitioners order." Taxpayer states that "under [its Patient Consent Agreement]... the surgeons, radiologist, pathologists, and anesthesiologists at [Taxpayer's facility] are independent contractors and are not employees or agents of [Taxpayer]. Any physician service charges are billed directly to the patient from the physician, not [Taxpayer]. In effect, Taxpayer maintains since the "surgical supplies" are used to correct a

malfunction of the body and its use is prescribed by one licensed to issue such a prescription, the "surgical supplies" are exempt.

While [45 IAC 2.2-5-28\(h\)](#) states, "The term 'medical equipment, supplies or devices,' as used in this paragraph, are those items, the use of which is directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body," this provision is not to be read in isolation from the remainder of the regulation. (Emphasis added). The Department refers to [45 IAC 2.2-5-28\(g\)](#), which states, "The sale to the user of medical equipment, supplies, or devices prescribed by one licensed to issue such a prescription are exempt from sales and use tax." (Emphasis added).

Notwithstanding that Taxpayer has not provided copies of the "prescriptions," it seems that the actual "disposable medical supplies" themselves would not be prescribed to the patient for the patient to "use" them. Apparent from the nature of the items for which an exemption is requested—i.e., "catheters, guides, introducers, various kits, various packs, disposable staplers, sheaths, trach tubes, foley trays"—these are the types of "disposable medical supplies" that are necessary for a "licensed practitioner" to complete a "prescribed procedure." Nonetheless, even if the items themselves were prescribed, the items would be for the "licensed practitioners" to "use" to carry out the provision of the medical services that the practitioners are providing to the patient. Thus, for the transactions in question, even if the "disposable medical supplies" were "sold" to the "patient," these "sales" were not to the "user" of the medical supplies. The "user" of the medical supplies would be the "independent contractors,"—i.e., surgeons, radiologists, pathologists, and anesthesiologists—that are "licensed practitioners" that "used" these supplies to carry out their medical services that they provide to the patient.

FINDING

Taxpayer's protest is respectfully denied.

II. Sales and Use Tax—"Purchases Paid by Government."

DISCUSSION

Taxpayer asserts that it mistakenly paid sales tax on its purchase of "medical supplies and equipment that were later resold to the federal and/or state government." Initially, the Department found Taxpayer had made purchases during the 2007 and 2008 tax years that were resold to patients covered under Medicare Part A and Medicaid. Since the items purchased were resold to—i.e., paid for by—the federal and state government, the items that were purchased were not subject to sales/use tax at the time of Taxpayer's purchase and were not subject to sales tax at the time of resale to the government. See IC § 6-2.5-5-8(b) (providing a purchase for resale exemption for sales/use tax); See also IC § 6-2.5-5-24 (providing a sales tax exemption for purchases made by the federal government); See also IC § 6-2.5-5-16 (providing a sales tax exemption for purchases made by the state of Indiana).

Taxpayer asserts that further adjustments need to be made to the assessments and/or refund denials. Taxpayer argues that a reduced assessment or increased refund is due for the "portions" of the sales transactions that are "paid directly by the government" to the hospital under Medicare Part B. Additionally, Taxpayer argues that since the Managed Medicare, Managed Medicaid, and Medicaid Care Select programs (hereafter, "managed care programs") are funded by the federal and state government and are merely managed by private care groups, a reduced assessment or increased refund from these sales to patients covered under the "managed care programs" is also due.

However, Taxpayer is mistaken. Taxpayer was not assessed sales tax on its failure to collect sales tax on its resale of items to patients covered under Medicare Part B or the "managed care programs." Even if Taxpayer's assertion about the sales not being subject to sales tax is presumed valid, a refund is not due Taxpayer. If sales tax were collected by Taxpayer as a retail merchant on Taxpayer's sales of items to patients, then Taxpayer, as the retail merchant, cannot receive a refund of the sales tax it collected unless the retail merchant has first refunded the sales tax it collected to its customer. See IC § 6-2.5-6-14.1 (providing that "a retail merchant is not entitled to a refund of state gross retail or use taxes unless the retail merchant refunds those taxes to the person from whom they were collected"). Since Taxpayer has not presented any information demonstrating that it collected sales tax from its customers as a retail merchant and refunded those monies collected back to the customers, then Taxpayer is not entitled to a refund of sales tax.

In the alternative, if Taxpayer meant to claim that a refund is due for the sales/use tax that it paid on its purchase of items to be resold, the relevant question is not to whom the Taxpayer made the sale. The relevant question is whether or not the items were actually resold. If the items were resold to patients, then the items would qualify for the purchase for resale exemption regardless of the customer's status. The status of the customer, as a government entity or otherwise, does not become relevant except in determining if the proper amount of sales tax was collected from the customer at the time of resale.

Based upon the documentation presented, it appears that the audit/refund investigation addressed the assessment of use tax and/or the denial of Taxpayer's refund of tax that Taxpayer paid at the time of purchase. Therefore, the audit division is requested to perform a supplemental audit. Taxpayer's protest is sustained to the extent that the supplemental audit reveals that Taxpayer has been assessed or requested a refund of use tax it paid on items that were resold to its patients. However, Taxpayer's protest is denied to the extent that the supplemental audit reveals that the items in question were not resold to patients. As discussed previously in Issue

I, items that are consumed/used by the hospital or the "licensed practitioners" to carry out the provision of the medical services that the practitioners are providing to the patient are not resold.

Additionally, Taxpayer asserts that the "government sales transactions" were not reviewed for the 2005 and 2006 tax years during the audit and presented additional information for "the government sales transactions" for the 2005 and 2006 tax years. However, Taxpayer neither explained to the Hearing Officer if use tax was assessed on these purchase transactions in the audit nor demonstrated to the Hearing Officer that a refund claim had been filed seeking the refund of tax it paid for the 2005 and 2006 tax year purchases. Again, the audit division is requested to perform a supplemental audit. Taxpayer's protest to the imposition of use tax on its purchase of items resold to the government is sustained to the extent that the items were resold and use tax was assessed in the audit. However, Taxpayer's protest to the imposition of use tax on its purchases of items resold to the government is denied to the extent that the items were not resold and to the extent that use tax was not assessed in the audit.

Please note that Taxpayer may still file a refund claim for the 2005 and 2006 tax years even though the refund claim may be out of statute for receiving a refund, the refund claim would be timely to extent the refund would offset an assessment of tax for those respective tax periods. See IC § 6-8.1-9-1.

FINDING

Taxpayer's protest is denied in part and sustained in part subject to the results of a supplemental audit as discussed above.

III. Tax Administration–Interest.

DISCUSSION

The Department issued proposed assessments that calculated the interest due on the tax from the due date of the returns for the tax periods. Taxpayer protests that the interest should instead be assessed from the 2009 refund date. Taxpayer maintains that the Department had use of the money from the due dates of the return until it was refunded in 2009.

Pursuant to IC § 6-8.1-9-2(d), the Department is given ninety days to credit or pay a refund from the date the refund claim is filed. If the Department fails to do so, the taxpayer's remedy is the payment of interest. In the instant case, Taxpayer received interest on the tax amount refunded to it to cover the time period from the date of the tax payments to the date the refund was granted.

Subsequently, the Department determined that the refund was not properly granted and made an assessment in an audit report. As provided under IC § 6-8.1-10-1(b)(3), the Department appropriately made an assessment of interest on the tax amounts from the due date of the return.

Taxpayer makes a fairness argument claiming that the Department had use of Taxpayer's money for the period from the due date of the return to the date the refund was granted. However, the Department, when it granted the refund, compensated Taxpayer for the use of its money by paying interest to Taxpayer as provided in IC § 6-8.1-9-2(d).

In fact, the Department notes IC § 6-8.1-10-1(e) expressly states that the interest cannot be waived.

Accordingly, the Department acted appropriately under the authority granted under statutes, and declines Taxpayer's invitation to take actions that exceed this statutory authority.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's assessments will be adjusted to reflect the items, for the two issues (the "bank transaction" issue and the "laundry transactions" issue) to which the audit division agreed prior to the hearing. Taxpayer's protest to the imposition of use tax on its purchases of "disposable medical supplies" is denied, as discussed in Issues I. Taxpayer's protest is denied in part and sustained in part subject to the results of a supplemental audit, as discussed in Issue II. Taxpayer's protest to the imposition of interest is denied as discussed in Issue III.

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